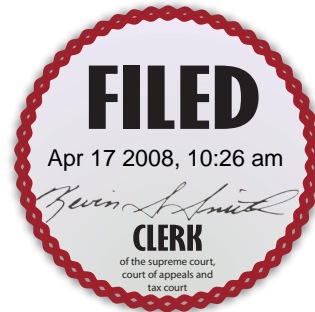


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MICHAEL P. MCILREE
Valparaiso, Indiana

ATTORNEYS FOR APPELLEE:

DEREK WHITACRE SCRANTON
Cincinnati, Ohio

STACIE E. BARHORST
Barhorst & Associates, P.C.
Chicago, Illinois

**IN THE
COURT OF APPEALS OF INDIANA**

SHAWN KELLEY,

Appellant-Defendant,

vs.

NATIONAL CHECK BUREAU, INC.,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 45A04-0708-CV-434

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jennifer Kalas, Judge Pro Tempore
Cause No. 45D11-0509-CC-191

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Shawn V. Kelley appeals from the trial court's judgment for National Check Bureau, Inc. ("NCB") in the amount of \$11,334.50, following a bench trial. Kelley raises three issues for our review,¹ which we consolidate and restate as the following two issues:

1. Whether the trial court abused its discretion when it did not specifically address NCB's alleged noncompliance with Indiana Trial Rule 9.2.²
2. Whether the court abused its discretion in allowing NCB to introduce certain exhibits into evidence.

We affirm.

¹ In the Statement of the Issues portion of Kelley's appellate brief, Kelley raises the issue of whether the court erred in entering judgment against him. But Kelley does not discuss or address the entry of judgment as a separate issue in his brief. Thus, to the extent that Kelley intended that issue to be distinct from his other issues, it is waived. See Ind. Appellate Rule 46(A)(8)(a).

² In relevant part, Rule 9.2 states as follows:

(A) When instrument or copy must be filed. When any pleading allowed by these rules is founded on a written instrument, the original, or a copy thereof, must be included in or filed with the pleading. Such instrument, whether copied in the pleadings or not, shall be taken as part of the record.

(B) Proof of execution of instruments filed with pleadings. When a pleading is founded on a written instrument and the instrument or a copy thereof is included in or filed with the pleading, execution of such instrument, indorsement, or assignment shall be deemed to be established and the instrument, if otherwise admissible, shall be deemed admitted into evidence in the action without proving its execution unless execution be denied under oath in the responsive pleading or by an affidavit filed therewith. . . .

* * *

(I) "Written instrument": When pleading is founded thereon—When pleading is not founded thereon term includes documents. When a pleading is founded upon a written instrument, any written indorsement or assignment of rights thereof upon which the pleader's title depends is included in the term "written instrument."

FACTS AND PROCEDURAL HISTORY

On September 21, 2005, NCB filed a complaint against Kelley, alleging, *inter alia*, breach of a Citibank credit card agreement (“Agreement”).³ NCB sought damages in the amount of \$8,750.63, with interest, for Kelley’s alleged failure to pay the balance on a credit card ending in 7392 (the “7392 Account”). NCB attached the Agreement to its complaint.

On January 25, 2006, the court granted NCB’s motion for default judgment after Kelley did not answer the complaint. In March, NCB initiated proceedings supplemental against Kelley. On May 1, Kelley filed a motion to set aside the default judgment for improper service of process, which the court granted.

On June 29, Kelley filed a motion requesting NCB to comply with Trial Rule 9.2 (“Motion to Comply”). Specifically, Kelley stated that NCB’s complaint “fail[ed] to attach a copy of the contract” and instead “only attach[ed] a copy of a blank [C]itibank agreement which is not executed.” Appellant’s App. at 21. Kelley also asserted that NCB failed to attach the proper documents to establish its assigned interest in the 7392 Account. The court granted Kelley’s request the next day,⁴ ordering NCB to file an amended complaint in compliance with Rule 9.2 “within thirty days.” *Id.* at 31.

³ The Agreement was originally sent together with the credit card to Kelley. In lieu of requiring Kelley’s signature on the Agreement, the Agreement required Kelley to sign the credit card and stated that “[t]his Agreement is binding on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of your account.” Appellant’s App. at 5.

⁴ Although dated June 30, 2006, the court’s order on the Motion to Comply did not appear on the chronological case summary until July 21, 2006. As a likely result, on July 19 NCB filed a response to the Motion to Comply rather than an amended complaint, in which NCB asserted that Rule 9.2 did not require it to attach an executed agreement.

On July 19, NCB filed a “Notice of Filing,” to which NCB had attached “[a]ccount information electronically transmitted from the original creditor” (“Exhibit 3”). Appellee’s App. at 1-2. On August 7, NCB filed various assignment documents and credit card statements from the 7392 Account “to be incorporated into the [c]omplaint” (“August 7 filings”). Id. at 3. The attached assignment documents included a Bill of Sale and accompanying affidavit, recognizing the assignment of the 7392 Account from Citibank to NCB (collectively, “Exhibit 1”). On August 22, the trial court entered an order denying a motion by Kelly for an extension of time to respond to a discovery request (“August 22 Order”). In the August 22 Order, the court noted “that [NCB] filed an amended complaint on August 7, 2006, which was apparently filed in compliance with the Court’s Order to comply with Trial Rule 9.2.” Appellant’s App. at 33 n.1. At no time did Kelley file a responsive pleading to the August 7 filings or an affidavit therewith denying the validity of those documents.

In October of 2006, NCB moved for summary judgment. In response, Kelley argued, among other things, that NCB had not complied with Rule 9.2. After a hearing, the court denied NCB’s motion for summary judgment. And one week before the beginning of the bench trial in March of 2007, Kelley again filed a “Request for Determination as to Plaintiff’s Compliance with Indiana Trial Rule 9.2.” Id. at 56.

The court held the bench trial without ruling on Kelley’s most recent Rule 9.2 filing. At the beginning of the trial, the court acknowledged the filing, but then noted that “since this is the bench trial today, it will put an end to the matter. I’ll take it under advisement based on what I hear today.” Id. at 64. Kelley did not object. And during

trial, NCB introduced into evidence, over Kelley's objections, the following exhibits: Exhibit 1, recognizing the assignment of the 7392 Account from Citibank to NCB; Exhibit 3, the electronic statement created by Citibank; the Agreement; and a letter ("Exhibit 7") created and sent by NCB to Kelley in conformity with the federal Fair Debt Collection Practices Act ("FDCPA"). On June 27, 2007, the court entered judgment in NCB's favor and ordered Kelley to pay NCB \$8,750.63, plus interest and costs. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Trial Rule 9.2

Kelley first argues that the trial court erred because it "never ruled on Plaintiff's Compliance with Indiana Trial Rule 9.2." Appellant's Brief at 5. In relevant part, Rule 9.2 states as follows:

(A) When instrument or copy must be filed. When any pleading allowed by these rules is founded on a written instrument, the original, or a copy thereof, must be included in or filed with the pleading. Such instrument, whether copied in the pleadings or not, shall be taken as part of the record.

* * *

(I) "Written instrument": When pleading is founded thereon—When pleading is not founded thereon term includes documents. When a pleading is founded upon a written instrument, any written indorsement or assignment of rights thereof upon which the pleader's title depends is included in the term "written instrument."

In the event of noncompliance with Rule 9.2, "[t]he court, in its sound discretion, may order compliance, the reasons for noncompliance to be added to the pleadings, or allow the action to continue without further pleading." Ind. Trial Rule 9.2(F). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts

and circumstances before the court. See, e.g., Rolland v. State, 851 N.E.2d 1042, 1045 (Ind. Ct. App. 2006).

The trial court did not abuse its discretion in how it addressed Kelley's requests for NCB to comply with Rule 9.2. The court ordered NCB to amend its complaint. On August 7, 2006, NCB filed Exhibit 1, together with various credit card statements from the 7392 Account, "to be incorporated into the [c]omplaint." See Appellee's App. at 3. Those filings satisfied NCB's duty to amend its complaint in accordance with Rule 9.2. Indeed, the trial court expressly acknowledged as much in the August 22 Order when it stated that NCB's August 7 filings were "in compliance with the Court's Order to comply with Trial Rule 9.2." See Appellant's App. at 33 n.1.

Although Kelley repeated his request that the court rule on the Trial Rule 9.2 issue after the August 22 Order, the court was not obliged to repeat itself. However, even if NCB's August 7 filings were somehow insufficient, it was within the court's discretion to allow NCB's cause to continue so that the court could base its decision on what it heard at trial. See T.R. 9.2(F). And, in entering judgment in favor of NCB, the trial court impliedly denied Kelley's repetitive requests regarding NCB's compliance with Rule 9.2.⁵ Kelley's position on this issue is without merit.

Issue Two: Admission of Evidence

Kelley also argues that the trial court abused its discretion when it admitted into evidence the Agreement and Exhibits 1, 3, and 7. Our standard of review of a trial

⁵ We note that, in its appellee's brief, NCB cites an unpublished decision of this court in support of its argument. We remind NCB's appellate counsel that a not-for-publication decision shall not be regarded as precedent and shall not be cited except to establish *res judicata*, collateral estoppel, or law of the case. App. R. 65(D).

court's findings as to the admissibility of evidence is an abuse of discretion. Ground v. State, 702 N.E.2d 728, 730 (Ind. Ct. App. 1998). Again, a trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. See, e.g., Rolland, 851 N.E.2d at 1045. We address each of Kelley's contentions in turn.

Agreement and Exhibit 1

Kelley argues that the trial court abused its discretion in admitting the Agreement, because that document was hearsay and not signed by Kelley, and in admitting Exhibit 1, because those documents were hearsay. NCB responds by noting that each of those documents was attached to the amended complaint and, accordingly, deemed established under Trial Rule 9.2(B). We agree with NCB.

Rule 9.2(B) states as follows, in pertinent part:

When a pleading is founded on a written instrument and the instrument or a copy thereof is included in or filed with the pleading, execution^[6] of such instrument, indorsement, or assignment shall be deemed to be established and the instrument, if otherwise admissible, shall be deemed admitted into evidence in the action without proving its execution unless execution be

⁶ Trial Rule 9.2(H) defines execution of a written instrument to include the following requirements:

- (1) That a signature was made with express, implied or apparent authority and was not forged;
- (2) That the instrument was properly delivered, including any requisite intent that it be effective;
- (3) That the written terms of the instrument have not been materially altered without the express, implied or apparent authority of the person bound thereon;
- (4) That the person seeking its enforcement is in possession of the instrument when required; and
- (5) That the names or identity of the persons named in the instrument are correct.

denied under oath in the responsive pleading or by an affidavit filed therewith. . . .

Thus, when documents are attached to a pleading pursuant to Rule 9.2(A), those documents, if not objected to under oath in a responsive pleading or affidavit filed therewith, are “deemed admitted into evidence” under Rule 9.2(B). T.R. 9.2(B); see, e.g., Mechs. Laundry & Supply, Inc. v. Wilder Oil Co., 596 N.E.2d 248, 253-54 (Ind. Ct. App. 1992) (holding that, under Rule 9.2(B), “an uncontested instrument . . . shall be deemed admitted into evidence without proving its execution.”), trans. denied. Once a document is admitted into evidence under Rule 9.2(B), there is “no need for the pleader claiming rights upon an instrument to formally offer the instrument into evidence.” Master Copy & Reprod. Ctr. v. Copyrite, Inc., 750 N.E.2d 824, 829-30 (Ind. Ct. App. 2001), trans. denied. Indeed, “the purpose of the provision is to eliminate the technicalities of formally introducing into evidence matters that are not disputed by either party.” Id. at 830.

Again, the Agreement and Exhibit 1 were each attached to NCB’s complaint either before or through NCB’s August 7 filings. But Kelley did not object to those documents either in a responsive pleading or in an affidavit attached to a responsive pleading. Indeed, Kelley never filed any responsive pleadings. Accordingly, those documents were “deemed admitted into evidence,” and Kelley has waived his argument that the court abused its discretion in allowing those documents during trial. See T.R. 9.2(B).

In his Reply Brief, Kelley asserts that he was not required to file a responsive pleading challenging the attached documents because “[a] party cannot deny execution

of an unexecuted document.” Reply at 2. But Kelley’s argument is circular. If he believed the documents to be unexecuted, Rule 9.2(B) mandates the proper method for him to challenge those documents. See Mechs. Laundry & Supply, 596 N.E.2d at 255. And insofar as Kelley is specifically referring to the absence of his signature on the Agreement, the Agreement expressly stated that it became binding on Kelley upon his use of the 7392 Account, not upon his signature to the Agreement. See supra note 3. We are not persuaded by Kelley’s position on appeal.

Exhibit 3

Kelley also argues that Exhibit 3 is hearsay and, as such, the court abused its discretion in admitting it during trial. NCB asserts that Exhibit 3 was attached to the amended complaint via the August 7 filings. But while Exhibit 3 was attached to NCB’s July 19 Notice of Filing, that Notice in no way referenced either the complaint or Trial Rule 9.2, unlike the August 7 filings. Further, the trial court did not expressly find Exhibit 3 to be an attachment satisfying the court’s order that NCB comply with Rule 9.2. Instead, in the August 22 Order, the court only referenced the August 7 filings, which only included Exhibit 1 and various credit card statements. Accordingly, we assume that Exhibit 3 was not attached to the complaint in accordance with the court’s order to NCB to comply with Rule 9.2.

However, even assuming that the trial court erroneously admitted Exhibit 3 into evidence during trial, “[e]rror in the admission of evidence may be harmless when the evidence is merely cumulative of other properly admitted evidence.” Witte v. Mundy, 820 N.E.2d 128, 135 (Ind. 2005). Here, Exhibit 3 contained only the following

information: Kelley's name; Kelley's social security number; the type of credit account and the account number; the date the account was opened; the interest rate; the date of last activity; the charge-off date; and the outstanding balance. None of that information was unique to Exhibit 3; indeed, we cannot identify—nor does Kelley—any pertinent information in Exhibit 3 that was not also included in the August 7 filings. Hence, Exhibit 3 was merely cumulative evidence, and the trial court did not commit reversible error in the admission of that exhibit.

Exhibit 7

Finally, Kelley contends that the trial court erred in admitting Exhibit 7, a letter created and sent by NCB to Kelley in conformity with the FDCPA. Specifically, Kelley's entire argument on this issue is as follows:

For whatever reason, the trial court allowed a dunning letter to be entered into evidence. Mr. Kelley has disputed the account under the [FDCPA]. To allow admission of this document served absolutely no purpose.

In fact, [Kelley] testified that he could not recall having an account and that the prior residence address where he used to live was used as a halfway house.

Appellant's Brief at 9 (citations to the record omitted). Kelley's argument is not supported either by cogent reasoning or citation to supporting authority. As such, it is waived. See Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, Kelley has not shown how the admission of Exhibit 7 prejudiced his rights. Thus, Kelley's claim of error cannot stand. See Ind. Evidence Rule 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]"); App. R. 46(A)(8)(a).

Conclusion

In sum, Kelley did not timely object to the admission of the Agreement and Exhibit 1 into evidence. As such, he has waived his argument that those documents were improperly admitted into evidence. Further, the trial court did not commit reversible error in the admission of either Exhibit 3 or Exhibit 7. Accordingly, we affirm the court's judgment against Kelley.

Affirmed.

BAILEY, J., and CRONE, J., concur.